

FILED BY CLERK

APR -7 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0258-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
ANDREW RAYMOND REXACH,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20080476

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

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Robert J. Hirsh, Pima County Public Defender  
By Michael J. Miller

Tucson  
Attorneys for Petitioner

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E S P I N O S A, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Andrew Rexach was convicted of driving under the influence of an intoxicant (DUI), based on the presence of cannabis metabolites in his blood, two counts of aggravated assault, and three counts of endangerment. The trial court sentenced Rexach to concurrent, partially aggravated

prison terms of five years’ each on the aggravated assault convictions, followed by consecutive, presumptive, one-year terms for the endangerment counts; it suspended the imposition of sentence for the DUI conviction and imposed a five-year probationary term for that offense.<sup>1</sup> In his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., Rexach contended his mother’s Chronic Obstructive Pulmonary Disease (COPD) and congestive heart failure had worsened after he had been sentenced and that the family needed him to help care for her. Conceding he knew she had these conditions at the time of sentencing, he claimed the exacerbation of these conditions was newly discovered evidence entitling him to be sentenced to lesser prison terms. *See* Ariz. R. Crim. P. 32.1(e). The trial court denied relief and this petition for review followed.

¶2 Absent a clear abuse of discretion, we will not disturb the trial court’s ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶3 At a hearing that initially was intended to be an evidentiary hearing, the trial court essentially assumed the factual allegations of the petition were true, rendering it unnecessary for Rexach to present the testimony of witnesses. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986) (colorable claim entitling defendant to evidentiary hearing is one which, if taken as true, “might have changed the outcome”).

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<sup>1</sup>Although the trial court did not articulate at the sentencing hearing the circumstances it found aggravating, it did specify the “severe emotional and physical harm to the victims” as aggravating factors in the portion of its sentencing minute entry labeled “later in chambers.”

The court thus assumed as true that Rexach's mother's conditions had worsened since he had been sentenced and the family needed him to help care for her. The trial court nevertheless denied the petition for post-conviction relief, finding "Petitioner's mother's underlying condition was known at the time of sentencing, therefore, it is not newly discovered." The court then rejected Rexach's argument that the exacerbation of his mother's condition constituted newly discovered evidence. The court noted that "declining health is not unexpected as individuals age" and that there is always "the potential" a defendant's family's circumstances will change after the defendant has been sentenced, including "the exacerbation of some previously existing known illness." It found that "Petitioner's mother's declining health arose after Petitioner was sentenced and can[]not be said to have existed but been undiscovered at the time of Petitioner's sentencing." Thus, it was not newly discovered evidence for purpose of obtaining post-conviction relief. *See State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989) (colorable claim of newly discovered evidence must show the evidence existed at time of trial or sentencing but was undiscovered despite defendant's exercise of due diligence).

¶4 On review Rexach essentially reiterates the arguments he raised in his petition for post-conviction relief. He insists the court's determination that the exacerbation of his mother's conditions was not newly discovered evidence was erroneous because the court did not correctly apply the factors set forth in *Bilke*. In addition to *Bilke*, Rexach also relies on *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990), and *State v. Ellevan*, 179 Ariz. 382, 880 P.2d 139 (App. 1994).

Acknowledging that in these cases the alleged newly discovered evidence was the defendants' illness, Rexach argues they support the conclusion that he was entitled to relief here.

¶5 Rexach has not persuaded us the trial court abused its discretion. In *Bilke*, unlike here, the defendant suffered from and experienced symptoms related to post-traumatic stress disorder at the time he was sentenced, but he was not diagnosed until after he was sentenced. 162 Ariz. at 53, 781 P.2d at 30. Thus, the court found the diagnosis and recognition of an existing condition was newly discovered evidence and the defendant had raised at least a colorable claim that this information might have affected the sentence. *Id.* In *Cooper*, the defendant did not learn until about six months after he had been sentenced that he was infected with the human immunodeficiency virus (HIV). 166 Ariz. at 128, 800 P.2d at 994. Applying the factors in *Bilke*, the court in *Cooper* concluded the defendant had raised a colorable claim based on the post-sentencing diagnosis of a condition that apparently existed at the time he was sentenced. *Id.* at 129-30, 800 P.2d at 995-96. Like the defendant in *Cooper*, the defendant in *Ellevan* had tested positive for HIV after he was sentenced, and it appeared he had been already infected with the virus at the time of sentencing. 179 Ariz. at 139, 880 P.2d at 382.

¶6 In *Bilke*, *Cooper*, and *Ellevan* the defendants' medical conditions existed at the time of sentencing but the defendants were not diagnosed until after sentencing. Here, Rexach knew his mother suffered from COPD and congestive heart failure at the

time he was sentenced, so these diagnoses were not newly discovered. That the conditions worsened, the court found, was to be expected. Moreover, because the exacerbated status of Rexach's mother's known conditions occurred after sentencing and did not exist at the time of sentencing, the trial court did not abuse its discretion in determining this was not newly discovered evidence as contemplated by Rule 32.1(e).

¶7 Even assuming arguendo that Rexach's mother's worsened condition could be viewed as newly discovered evidence for purposes of Rule 32.1(e), the trial court nevertheless did not abuse its discretion in denying relief. At the conclusion of its minute-entry order, the trial court made clear that, even if it were to consider Rexach's mother's current condition and the fact that family members needed Rexach to help care for her, the court still regarded the prison terms it had imposed as appropriate. The court did not believe the "new" information would be sufficiently mitigating to alter the propriety of the sentences it had imposed, "given the severity of the injuries suffered by the victims." Just as we will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion, *Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948, we will not disturb a sentence that is within statutory parameters absent a clear abuse of discretion, *see State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). Similarly, it is for the trial court to determine, in the exercise of its discretion, whether aggravating or mitigating circumstances exist and the weight to be given to these factors in determining the appropriate sentence. *See State v. Webb*, 164 Ariz. 348, 355, 793 P.2d 105, 112 (App. 1990).

¶8 Rexach has not established the trial court abused its discretion in denying his petition for post-conviction relief. Accordingly, we grant his petition for review but deny relief.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge